COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of WorldCom Technologies, Inc. Against New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts	)	D.T.E. 97-116

COMMENTS OF
VERIZON MASSACHUSETTS

Verizon Massachusetts ("Verizon MA") files these comments pursuant to the Department's request for comments concerning the impact of the Federal Communications Commission's ("FCC") *Order on Remand* in CC Docket Nos. 96-98, 99-68 (adopted April 18, 2001).[1] The FCC's *Order on Remand* removes any arguable controversy over the correctness of the Department's May 19, 1999 decision and subsequent orders,[2] which held that Internet-bound traffic was non-local, interstate traffic not subject to reciprocal compensation payments under the Act, and lays to rest all CLEC claims that Verizon MA has ever been or is now and in the future obligated to pay reciprocal compensation for Internet-bound traffic. As a result, little is left for the Department to do except to terminate these dockets by reaffirming the conclusions it reached in D.T.E. 97-116-C, D, and E—that federal law is dispositive of the reciprocal compensation terms of the parties' interconnection agreements.

---

1 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, *Intercarrier Compensation for ISP-bound Traffic,* CC Docket No. 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. April 27, 2001) ("*Order on Remand*").

2 *See* D.T.E. 97-116-C (May 19, 2000); D.T.E. 97-116-D, 99-39 (February 25, 2000); D.T.E. 97-116-E (July 11, 2000).

I. BACKGROUND

In accordance with the Act, Verizon MA entered into negotiated interconnection agreements with WorldCom and GNAPs in 1996 and 1997. These interconnection agreements adopt the same reciprocal compensation obligations that are imposed by federal law. They mirror the FCC's rule that limits reciprocal compensation obligations to "local telecommunications traffic" — defined as calls that both originate and terminate locally (*see Local Interconnection Order*, 11 FCC Rcd at 16013, ¶ 1034) by providing that reciprocal compensation only applies to the transport and termination of "local" traffic. Verizon MA/WorldCom Agreement, at §§ 1.38, 5.8.1; Verizon MA/GNAPs Agreement, at §§ 1.38, 5.7.1. Moreover, the interconnection agreements define the term "reciprocal compensation" to be "As Described in the Act," which means "as described in or *required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Department*." Verizon MA/WorldCom Agreement, at §§ 1.6, 1.53 (emphasis added); Verizon MA/GNAPs Agreement, at §§ 1.6, 1.54.

After these agreements were executed, WorldCom and GNAPs claimed that they require Verizon MA to pay reciprocal compensation for calls originated by Verizon MA customers, handed off to WorldCom or GNAPs and routed from there to ISPs for termination to a destination somewhere on the Internet. Verizon MA refused to pay such compensation because federal law, and thus the agreements, requires reciprocal compensation *only* for local traffic and, under a long series of FCC decisions, Internet-bound traffic is interstate, not local.

When the parties could not resolve their dispute, WorldCom filed a complaint with the Department seeking reciprocal compensation for Internet-bound traffic. Since the outset of this case, the Department has proceeded on the basis that resolving the status of Internet-bound

calling under the parties' interconnection agreements rested on the jurisdictional classification of such traffic under applicable FCC precedent and the Act. *See* D.T.E. 97-116 (October 21, 1998), at 4, 10-15. The Department's initial ruling in this case in October 1998, was based on an interpretation of FCC precedent which the Department believed required that it classify Internet-bound traffic as jurisdictionally "local" traffic on the basis of the so-called "two-call" theory and hence *intrastate* rather than *interstate* calling. D.T.E. 97-116, at 10-14.[3] As the Department later explained, it reached this initial decision

> *not* because we felt that it was a good policy or that it promoted competition, *but* because we felt bound by the then-current state of decisional law, relying to a large degree on the FCC's own previous pronouncements to the effect that Internet calls represented two distinct services …

Id., at 37 (emphasis in original).

The FCC's *Internet Traffic Order*[4] established that the Department's interpretation of FCC precedent regarding the jurisdiction of Internet-bound traffic was in error,[5] and in May 1999, the Department issued D.T.E. 97-116-C which vacated the October 1998 ruling. The Department succinctly explained why its initial decision could not stand:

---

[3] The Department also required Verizon MA to apply this conclusion to its interconnection agreements with other CLECs, including GNAPs. *See* D.T.E. 97-116, at 14. In issuing this order, however, the Department twice acknowledged that FCC authority over the question may trump or supersede the Department's ruling. Accordingly, the Department placed all parties on notice that "the FCC may make a determination in proceedings pending before it that could require us to modify our findings in this Order." D.T.E. 97-116, at 5 n.11; 6 n.12.

[4] *Implementation of Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999) (the "Internet Traffic Order").

[5] In its *Internet Traffic Order*, the FCC confirmed a long line of cases which held that Internet-bound calls are not severable into separate intrastate and interstate components because they "do not terminate at the ISP's local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state." *Internet Traffic Order*, at ¶ 12. The FCC also ruled that "reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic" (*Internet Traffic Order*, at ¶ 26) and that "ISP-bound traffic is non-local interstate traffic." *Id*., at n.87. As a result, "the reciprocal compensation requirements of section 251(b)(5) of the Act and [the FCC's implementing] rules do not govern inter-carrier compensation for this traffic." *Id.*

> The Department's October Order [D.T.E. 97-116] … confined its enquiry in this matter solely and exclusively to whether the ISP-bound traffic in question was "local" (i.e., intrastate) or interstate calling. This limitation of the basis for the Department's holding was express; and no other basis may be reasonably inferred from the Order. The October Order's effectiveness was thus ransom to the validity of its legal or jurisdictional conclusion. As it happens, the Department's "two-call" theory cannot be squared with the FCC's "one-call" analysis. In rendering its "two-call" decision on reciprocal compensation for ISP-bound traffic, the Department twice acknowledged that FCC authority over the question may trump or supersede the Department's.

See D.T.E. 97-116-C, at 21-22. The Department acknowledged, however, that, in accord with the FCC's decision, WorldCom could "renew its complaint" and claim that there was a basis *other* than the "two-call" theory for finding that the agreement requires reciprocal compensation for Internet-bound traffic. *See id*., at 27. Following the Department's ruling, neither WorldCom, nor any other party, has accepted the Department's invitation to pursue that issue.[6]

The Department further explained that the reciprocal compensation regime approved in its October 1998 Order "does not promote real competition" and "is really just an unintended arbitrage opportunity" that "enriches competitive local exchange carriers, Internet service providers, and Internet users at the expense of telephone customers or shareholders." D.T.E. 97-116-C, at 32. Although it recognized that profit-maximizing companies should not be chastised for exploiting such loopholes, the Department concluded that "regulatory policy . . . ought not create such loopholes or, once having recognized their effects, ought not leave them open." *Id.*, at 33.

In March 2000, the D.C. Circuit vacated and remanded the *Internet Traffic Order*. The court did so, however, *not* because the FCC's decision was substantively incorrect, but rather for

---

[6] The Department subsequently denied Motions for Reconsideration filed by WorldCom and other CLECs; it also dismissed as moot a complaint GNAPs had filed in April 1999. *See* D.T.E. 97-116-D, at 17-21.

lack of sufficient explanation. *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000). The court made clear that, with proper explanation, the FCC could again determine that neither the Act nor its regulations impose reciprocal compensation obligations for Internet-bound traffic.[7] *See id.*

Following the D.C. Circuit's decision to vacate and remand the *Internet Traffic Order*, GNAPs filed a motion urging the Department to vacate its May 1999 Order. After further administrative proceedings, the Department decided to leave its May 1999 Order in place for the time being. The Department found: first, that the D.C. Circuit's decision did not require it to reinstate the October 1998 Order, and, second, that it would not be sound public policy for it to reinstate that order at that time. In support of the first finding, the Department noted that the D.C. Circuit did not hold that Internet-bound traffic is local as a matter of federal law or otherwise hold that federal law unambiguously requires adoption of the "two-call" theory. *See* July 2000 Order, at 11, 12, and 14.

II. DISCUSSION

A. The *Order On Remand* Reaffirmed The FCC's Previous Conclusion That Internet-Bound Traffic Is Not Eligible For Reciprocal Compensation Under The Act.

The *Order on Remand* reaffirmed the FCC's earlier conclusion that Internet-bound traffic is jurisdictionally interstate. *Order on Remand*, at ¶ 57. The FCC also found that communications with ISPs are a form of interstate access traffic that is not subject to reciprocal

---

Following denial of these Motions, WorldCom sought review of the Department's May 1999 Order in Federal Court, and GNAPs filed two related complaints.

[7] Indeed, although some petitioners in that case — including WorldCom — had asked the court to rule that Internet-bound traffic terminates at the ISP and is therefore subject to reciprocal compensation under section 251(b)(5), the court did not issue such a judgment. Instead, it concluded only that the FCC had insufficiently explained two aspects of its decision. *See id.*, at 9 ("the Commission has not provided a satisfactory explanation of why LECs that terminate calls to ISPs are not properly seen as 'terminat[ing] . . .

compensation under 47 U.S.C. § 251(b)(5). *Id.,* at ¶ 30 (holding that "the service provided by LECs to deliver traffic to an ISP constitutes….'information access' under 251(g) and, thus, compensation for this service is not governed by section 251(b)(5)"). Since ISP-bound traffic is a form of interstate access service, and therefore excluded from section 251(b)(5) by section 251(g), the FCC held that it has the *exclusive* authority pursuant to section 201 to establish rules governing intercarrier compensation for such traffic. *Order on Remand,* at ¶ 52.

In addition, the FCC reaffirmed its view that ultimately led it to rule in the *Internet Traffic Order* that Internet-bound traffic is not "local" traffic because it is one continuous call and not, as CLECs have argued to the FCC and the Department, two separate calls. The FCC again held that "[m]ost Internet-bound traffic traveling between a LEC's subscriber and an ISP is indisputably interstate in nature when viewed on an end-to-end basis." *Order on Remand,* at ¶ 58. "The 'communication' taking place is between the dial-up customer and the global computer network of web content, e-mail authors, game room participants, databases, or bulletin board contributors. Consumers would be perplexed to learn regulators believe they are communicating with ISP modems, rather than the buddies on their e-mail lists." *Id.,* at ¶ 59. "ISP service is analogous, though not identical, to long distance calling service." *Id.,* at ¶ 60. The FCC explicitly agreed with local exchange carriers that "the technical configurations for establishing dial-up Internet connections are quite similar to certain network configurations employed to initiate more traditional long-distance calls," in particular, Feature Group A access service. *Id.*, at ¶ 61. "An Internet communication is not simply a local call from a consumer to a machine . . . . ISPs are service providers that technically modify and translate communication, so that their customers will be able to interact with computers across the global Internet." *Id.,*

---

local telecommunications traffic,' and why such traffic is 'exchange access' rather than 'telephone exchange service'").

at ¶ 63. The FCC explicitly rejected the claim that ISP-bound traffic "'is really like a call to a local business' — such as a pizza delivery firm." *Id.*, at ¶ 64. In summary, the FCC once again reaffirmed that the "two-call" theory is wrong.

The FCC's reaffirmation of these conclusions is completely consistent with the decision reached by the Department in its May 2000 Decision and its reversal of its earlier (October 1998 Decision) which was based on the now repudiated "two-call" theory and the conclusion that Internet-bound traffic was intrastate.

Having asserted jurisdiction over ISP-bound traffic, and recognizing that the existing carrier-to-carrier compensation scheme in states that apply reciprocal compensation to such traffic presents opportunities for "regulatory arbitrage," the FCC adopted an interim intercarrier compensation scheme designed to address this issue by "limiting carriers' opportunity to recover costs from other carriers and requiring them to recover a greater share of their costs from their ISP customers."[8] *Order on Remand*, at ¶¶ 66-88. The FCC stated that while the final method of compensation would be determined in the context of a further investigation, its "evaluation of the record evidence to date strongly suggests that bill and keep is likely to provide a viable solution to the market distortions caused by the application of reciprocal compensation to ISP-bound traffic." *Id.*, at ¶ 74. The FCC articulated the purpose and applicability of its interim compensation scheme as follows:

> [P]ending our consideration of broader intercarrier compensation issues in the *NPRM*, we impose an interim intercarrier compensation regime for ISP-bound traffic that serves to limit, if not end, the opportunity for regulatory arbitrage, while avoiding a

[8] To the extent CLECs are eligible for compensation for Internet-bound traffic under the FCC interim compensation scheme, a 3:1 traffic ratio presumption (rather than the 2:1 ratio the Department ordered) would determine whether traffic was Internet-bound traffic subject to the interim compensation scheme. *See id*., at ¶ 79. The maximum number of minutes for which a CLEC may recover compensation for Internet-bound traffic is capped at the number of minutes, if any, for which a carrier was entitled to compensation during the first quarter of 2001, plus a 10% growth factor for the year. *See id*., at ¶ 78.

> market-disruptive "flash cut" to a pure bill and keep regime. The interim regime we establish here will govern intercarriers compensation for ISP-bound traffic until we have resolved the issues raised in the intercarrier compensation *NPRM*.

Id., at ¶ 77.

In summary, the FCC put in place an interim compensation scheme for ISP-bound traffic designed to minimize or eliminate the arbitrage opportunities associated with other intercarrier compensation mechanisms and to provide a gradual transition mechanism to a bill and keep regime for those carriers that are currently receiving reciprocal compensation. *See id.* In doing so, the FCC held that state commissions no longer have authority to address the issue of compensation for Internet-bound traffic.[9] *Id.*, at ¶ 82. In addition, as of the adoption date of the *Order on Remand*, "carriers may no longer invoke section 252(i) [of the Act] to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic." *Id.* and n.155. Since the Department previously indicated that it would be "bound by the determinations made by the FCC on remand," it should acknowledge that the FCC has now preempted state authority to address the issue of compensation for Internet-bound traffic by acting consistently with this Department's prior orders — and terminate this proceeding without further action.

The import of the *Order on Remand* on this proceeding is clear. As noted above, the Department has consistently determined the issue of compensation for Internet-bound traffic under the parties' Interconnection Agreements in accordance with federal law. This is

---

[9] The FCC stated that its interim compensation regime does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. *Id*., at ¶ 82. In Massachusetts, Verizon MA has no contractual obligation to pay reciprocal compensation on Internet-bound traffic. As noted above, the Department held in D.T.E. 97-116-C that, in accord with the FCC's *Internet Traffic Order*, WorldCom could "renew its complaint" and claim that there was a basis *other* than the "two-call" theory for finding that the agreement requires reciprocal compensation for Internet-bound traffic. *See* D.T.E. 97-116-C, at 27. Following the Department's ruling, neither WorldCom, GNAPs, nor any other party has made a claim.

completely consistent with the expressed intention of the parties to the WorldCom and GNAPs Interconnection Agreements since they agreed that federal law would determine their obligations with respect to this issue. The *Order on Remand* makes it crystal clear that no compensation was due to those carriers for Internet-bound traffic. Therefore, in light of the *Order on Remand*, the Department must reaffirm its prior conclusion that the WorldCom and GNAPs Interconnection Agreements do not entitle them to reciprocal compensation for Internet-bound traffic since such traffic is not and never has been intrastate, local traffic eligible for such reciprocal compensation under those agreements.

For carriers not already exchanging traffic pursuant to interconnection agreements prior to the FCC's adoption of the *Order on Remand* (i.e., where a new carrier enters the market or an existing carrier expands into a market it previously had not served) the FCC has explicitly held that such carriers are required to exchange Internet-bound traffic on a bill and keep basis during the interim period. *Id.*, at ¶ 81. Therefore, pursuant to the *Order on Remand*, new or existing carriers who entered the Massachusetts market after April 18, 2001, are required to exchange traffic to ISPs on a bill and keep basis and are not entitled to reciprocal compensation for such traffic. *Id.*, at ¶ 81.

III. CONCLUSION

For all of the foregoing reasons, the Department should terminate these dockets with prejudice by issuing an order that reaffirms the decisions in 97-116-C, D, and E—that federal law determines the meaning of the reciprocal compensation terms of the parties' interconnection agreements and that, in light of the *Order on Remand*, the express language of the WorldCom and GNAPs Interconnection Agreements does not provide for reciprocal compensation for Internet-bound traffic.

Respectfully submitted,

VERIZON NEW ENGLAND INC.,
D/B/A VERIZON MASSACHUSETTS

By its attorneys,

_____

Bruce P. Beausejour
Keefe B. Clemons
185 Franklin Street, Room 1403
Boston, MA 02110-1585
(617) 743-2445

Dated: June 13, 2001